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IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1975
No.

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER, and BETTY RODGERS,

Petitioners

v.

MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Geneva Ruffin, Delores Gates, Elaine Porter and Betty Rodgers (hereinafter referred to as the "Chalfontes") appeal from the opinion of the United States Court of Appeals for the Sixth Circuit entered June 5, 1975, denying Petitioners' Petition for Rehearing, the opinion of the United States Court of Appeals for the Sixth Circuit dated March 31, 1975, denying Petitioners' appeal and affirming the decision of the Court below, and the Memorandum Opinion and Order of April 11, 1974, on which final judgment was entered on April 12, 1974, by the Honorable Charles W. Joiner, United States District Judge, Eastern District of Michigan, which Memorandum Opinion and Order granted Respondents' Motion for a Judgment Notwithstanding the Verdict in this cause.

OPINIONS BELOW

Attached hereto as Appendix A is the Memorandum Opinion and Order of U.S. District Court Judge Charles W. Joiner, rendered April 11, 1974, and the final judgment entered thereon on April 12, 1974, which granted Respondents' Motion for Judgment Notwithstanding the Verdict and ordered that the Petitioners take nothing and that the instant action be dismissed with prejudice. Attached hereto as Appendix B is the *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, from which this appeal is taken, dated March 31, 1975, affirming the opinion of the Trial Court. Also attached hereto, and denoted Appendix C, is the Summary Order of the United States Court of Appeals for the Sixth Circuit, dated June 5, 1975, denying Petitioners' Petition for Rehearing.

GROUNDS ON WHICH JURISDICTION IS INVOKED

As stated above, the judgment sought to be reviewed is the *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, dated March 31, 1975. Following the handing down of that decision, Petitioners filed a Petition for Rehearing, which rehearing was denied by the United States Court of Appeals for the Sixth Circuit, on June 5, 1975.

It is the position of petitioners that 28 USC Section 1254 (1) confers jurisdiction on the Supreme Court to review the judgment in question by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioners' Seventh Amendment right to a trial by jury was violated by the Appellate Court below when that Court ruled that oral promises made to Petitioners by Respondents were not supported by consideration, when facts of record in the Trial Court clearly contradict this statement, when the Trial Court did not make a similar finding that consideration failed to exist, and when the jury, after being instructed by the Trial Court on the legal necessity for consideration in the making of a contract, found that such consideration existed, in returning a judgment in favor of the Petitioners in the amount of $125,000?

2. Whether the Appellate Court erred in failing to find that the Trial Court had abridged Petitioners' Seventh Amendment right to a trial by jury, in granting Respondents' Motion for a Judgment Notwithstanding the Verdict on the grounds that Mercury's agent did not possess express or implied authority to bind Mercury and that the oral promises made by Mercury were not enforceable because they were merely commercial puffing and did not possess requisite certainty, when, evidence existed on which reasonable men could differ that Mercury's agent possessed expressed or implied authority or had been clothed by Mercury with the indicia of apparent authority to make the promises, and evidence existed that Mercury had begun to perform its obligations under the oral promises, which promises reasonable men could believe and that such promises had sufficient meaning to be enforceable?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VII to the United States Constitution states as follows:

> "In Suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Federal jurisdiction in this cause is based on 28 USC Section 1332, which grants the Disctrict Courts original jurisdiction in civil actions where the amount in controversy exceeds $10,000, and is between citizens of different states. See 28 USC Section 1332 (a)(1). Petitioners are all residents of the State of Michigan, while Respondents are corporations, incorporated in the State of Illinois, with their principal place of business in Chicago, Illinois.

B. Statement of Facts

The four Petitioners in this action formed a singing group called the Chalfontes in 1963. They all resided at the Brewster Housing Projects, a low income project in Detroit at that time.

Two of the girls, Ms. Porter and Ms. Rodgers, had sung together for some time prior to the formation of the group, and had been connected with various recording studios, including Motown. The Chalfontes had had occasion to rehearse with various famous singers and groups, such as the Spinners and Marvin Gaye. Prior to their forming the Chalfontes, Ms. Porter and Ms. Rodgers had actually received an offer to join a Motown recording group, the Marvellettes, but they declined that proposal. Also, the Chalfontes had grown up in the Brewster Housing Projects with the members of another famous singing group, The Supremes.

In late 1964 or early 1965, the Chalfontes, while appearing at the Gold Room of the Twenty Grand, a nightclub in Detroit, were first approached by Mr. Andre Williams, Artist and Repertoire Staff Recording Director, for Mercury. Mr. Williams informed the Chalfontes that they sounded much better than the Supremes, and he inquired as to whether they were interested in signing a recording contract with one of the world's major companies, i.e., Mercury. Ultimately, the Chalfontes signed with Mercury Records, entering into a written recording agreement on or about February 17, 1965.

Following this contract signing in Detroit with Mercury, at a session presided over by Mr. Williams, on behalf of Mercury, the Chalfontes were taken to Chicago for a "dub session", produced by Mr. Williams. In early March of 1965, the first recording session for the Chalfontes was held in Detroit, once again produced by Mr. Williams. Two sides recorded at that session were ultimately released by Mercury — "Much Too Much For Comfort" and "He's The Right Kind of Guy." The Chalfontes were promised by Mr. Williams at this session that they would receive nationwide publicity. However, the Chalfontes did not receive any promotion from Mercury following this session. Finally the first record was released, and the attorney for the Chalfontes received a letter from Mr. Morris Diamond, a Mercury executive, stating that Mercury would ". . . be able to get the girls on the road." Following the release of the first record, minimal promotional efforts were made by a local promotion man for Mercury in Detroit, and the Chalfontes were taken by Mercury to a benefit in

St. Louis, Missouri, which included stopovers in Chicago, Illinois and Dayton, Ohio.

Thereafter, a second recording session was held in Detroit, in the summer of 1965. Again, Mr. Williams produced this session and once again, Mr. Williams promised the Chalfontes that they would receive national promotion. Two sides from that session, "He Loves Me" and "Confessin' My Love To You" were released. Testimony adduced at the trial indicated that no promotional efforts were made following release of the second record. There were no trips. Neither was there publicity.

Still, Mercury informed the Chalfontes that it was exercising its option to extend their contract for an additional year. A third recording session was held, but no sides were released from this session. There was no record of any further promotional efforts by Mercury. After that third session, Mercury, in an attempt to close out the business relationship that never really began, sent the Chalfontes a release from the recording agreement. The release was not signed by the Chalfontes. Thereafter, the Chalfontes, in an attempt to redress their legal grievances, filed this action against Mercury. The suit alleged breach of certain oral promises made by Mercury to the Chalfontes, including promises of substantial road travel for the Chalfontes throughout the United States at Mercury expense, and of substantial nationwide advertising and promotion. This suit also concerned the breach of express and implied contractual provisions by Mercury, involving the recording agreement of February 17, 1965.

At the close of a jury trial of almost three weeks duration, the U.S. District Court Judge did allow the jury to consider the breach of four alleged contractual promises, two of which concern the recording agreement of February 17, 1965, and two of which concern oral agreements between the Chalfontes and Mercury. He specifically instructed the jury on oral contracts as follows:

"The oral promises alleged by the plaintiffs to have been made

by the defendants are:

1. Substantial road travel for promotional appearances, and

2. Substantial nationwide advertising and promotion.

In order for the plaintiffs to recover on this theory, you must find:

1. That one or more of the oral promises were made by the defendants, and

2. That the oral promise was accepted by the plaintiffs as defined in these instructions, and

3. That there was consideration for the promise as defined in these instructions, and

4. That there was mutual assent to the terms of the promise as defined in these instructions, and

5. As to promises made contemporaneously with or prior to the making of the written contract, that the parties did not intend that the written contract should supersede the oral promises." *Jury Charge p. 14, 15.*

In submitting the case to the jury, the Court, *sua sponte*, propounded interrogatories to the jury.

On March 2, 1974, the jury returned its verdict, after approximately one and one-half days of deliberation. Its verdict was in favor of the Chalfontes, and against Mercury in the amount of $125,000. The jury found, in response to the Court's interrogatories, that Mercury had breached oral contracts with the Chalfontes to provide them with substantial road travel for promotional appearances and to provide them with substantial nationwide advertising and promotion. (The jury also found that Mercury had not breached duties under the recording agreement to reasonably promote the Chalfontes, and to possess a corporate

organization reasonably capable of fulfilling the obligations stated in the recording agreement between the parties.)

Thereafter, Mercury filed a Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial. Mercury's Motion for a Judgment Notwithstanding the Verdict was granted by the Trial Court on April 11, 1974 on three basic grounds: 1) That Mercury's agent did not possess express or implied authority to bind Mercury on the oral promises; 2) That the oral promises were nothing more than commercial "puffing" and did not possess requisite certainty to form an enforceable contract; and 3) All statements made contemporaneous with or prior to the written contract were merged in the written contract and were not binding on Mercury.

From that Memorandum Opinion and Order, the Chalfontes appealed to the United States Court of Appeals for the Sixth Circuit. That Court ruled that the Trial Court had correctly held that the parol evidence rule barred the introduction into evidence of the oral promises made before the contract was signed and precluded their enforcement. However, as the Petitioners pointed out to the Appellate Court, the Trial Judge had failed to consider, in his opinion, the substantial evidence that oral contracts had been made *after* the contract had been signed. Substantial evidence existed in the record which indicated that these promises were supported by consideration.

However, the Appellate Court ruled that "Any oral promises made after the contract had been signed were unenforceable because they were not supported by consideration." *Ruffin, et al* v. *Mercury Record Productions, et al*, Case No. 74-2127, p.3. This ruling was made despite the fact that there was evidence in the record indicating the existence of consideration, the lack of any specific finding by the Trial Judge on this ground, and the jury's implied finding that consideration existed.

ARGUMENT

By determining the instant case in the way in which it did, the United States Court of Appeals for the Sixth Circuit decided, in the opinion of Petitioners, a Federal question in a way in conflict

with applicable decisions of this Court, by infringing on Petitioners' Seventh Amendment right to a trial by jury. Additionally, the United States Court of Appeals for the Sixth Circuit, by determining the appeal brought before it in the manner which it did,sanctioned the departure by the lower Court from the accepted and usual course of judicial proceedings, as the District Court, in the opinion of Petitioners, also invaded Petitioners' Seventh Amendment right to a trial by jury.

A. THE DETERMINATION BY THE APPELLATE COURT THAT NO CONSIDERATION EXISTED FOR THE ORAL PROMISES GIVEN BY MERCURY'S AGENT TO THE CHALFONTES SUBSEQUENT TO THE SIGNING OF THE RECORDING AGREEMENT OF FEBRUARY 17, 1965, IS DIRECTLY CONTRARY TO THE EVIDENCE WHICH APPEARED IN THE RECORD, AND CONTRARY TO THE JURY'S IMPLIED FINDING THAT SUCH CONSIDERATION EXISTED FOR THE ORAL PROMISES INVOLVED.

The United States Court of Appeals for the Sixth Circuit in this case, of course, ruled that "Any oral promises made after the contract had been signed were unenforceable because they were not supported by consideration." *Ruffin, et al* v. *Mercury Record Productions, et al,* Case No.74-2127, p.3. The Court of Appeals faced the issue of promises made to the Chalfontes by Mercury after the contract had been signed, because, Petitioners had pointed out in their Brief and Argument before the Court of Appeals that the Trial Court had ignored, in its summary treatment of the issues involved in this case, any oral promises made after the contract signing. The Trial Court had not even considered the fact that such oral promises provided a separate basis for the jury's verdict in this cause in favor of Petitioners, when the Trial Court decreed that the parol evidence rule barred the introduction into evidence of oral promises made before or at (not after) the contract signing and precluded their enforcement.

As stated, the instant case was tried before a jury, and that jury rendered a verdict in favor of the Petitioners in the amount of

$125,000. The Trial Court, thereafter, vacated the jury's verdict, by granting Respondents' Motion for a Judgment Notwithstanding the Verdict.

Civil trials in the federal judicial system are of course governed by the Seventh Amendment to the United States Constitution, which states:

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

Thus, for a fact tried by a jury to be reexamined, the rules of the common law must be followed, or a party's right to a trial by jury will be infringed. By making the ruling which it did on the issue of consideration, the Court of Appeals infringed on Petitioners' right to a trial by jury.

Of course, the Seventh Amendment right to a trial by jury has been oft-commented upon by the U.S. Supreme Court. For example, in the case of *Slocum* v. *New York Life Insurance Co.*, 228 US 364, 382, 33 SCt 523, 530, 57 LEd 879, 888 (1912), the Court stated:

> "In the trial by jury, the right to which is secured by the Seventh Amendment, both the Court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issue of fact. Only through the cooperation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right."

In *Slocum*, the Supreme Court reversed the Circuit Court of Appeals, which had earlier reversed the jury's verdict in favor of the Plaintiff on a policy of life insurance, by granting a Judgment Notwithstanding the Verdict.

It is proper, of course, within carefully circumscribed limits, for the Trial Court to take a decision away from the jury, by granting, either a Directed Verdict, or a Judgment Notwithstanding the Verdict, under Fed. Rules Civ. Proc. Rule 50(a) and 50(b). Yet, in deciding such motions, it is not proper for the Trial Court to weigh evidence or substitute its judgment of the facts for that of the jury. Likewise, it is improper for the Appellate Courts to do the same. The standard to be properly employed in determining Motions for Judgments Notwithstanding the Verdict is the same as that used in deciding Motions for a Directed Verdict. 9 Wright & Miller, *Federal Practice and Procedure*, Section 2524, p.542. As that standard was enunciated in *Simblest* v. *Maynard*, 427 F2d 1, 4 (2nd Cir, 1970) the proper test:

> "Is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the evidence that reasonable men could have reached."

This doctrine is not, by any means, a recent one, as early expressions of similar sentiments can be found in the annals of Supreme Court opinions. For example, in *Rankin* v. *Fidelity Insurance Trust & Safe Deposit Co.*, 189 US 242, 23 SCt 553, 47 LEd 792 (1903), the Supreme Court held that

> "This case could only have been withdrawn from the jury on the theory that, taking all the testimony together, there could be but one reasonable interpretation put upon the conduct of the Defendant with respect to these certificates." 189 US at 253.

In *Rankin*, the Supreme Court held that the Trial Court properly submitted the case to the jury, on the question of ownership of various shares in question.

Thus, it is not the position of the Plaintiffs-Appellants that the use of devices such as the Directed Verdict and Judgment Notwithstanding the Verdict are violative of the Seventh Amendment, if they are used in manners consistent with the guidelines set down by the Courts and the rules themselves. The

Courts have frequently rejected Seventh Amendment assaults on these procedural mechanisms, as in *Galloway* v. *United States*, 319 US 372, 63 SCt 1077, 87 LEd 1458 (1943) where the Supreme Court held that the amendment was basically designed to preserve the institution of the jury trial in its most fundamental aspects and not in a voluminous mass of procedural peculiarities which varied widely even at that time. Still, in order not to violate the party's Seventh Amendment right, it is necessary for Courts to follow carefully prescribed standards, when granting Motions for a Directed Verdict and Judgment Notwithstanding the Verdict.

The Court of Appeals, in this case, obviously did not grant, by the face of their opinion affirming the Trial Court, a Judgment Notwithstanding the Verdict or a Motion for a Directed Verdict. However, that Court committed a similar act, by ruling on a fact question, (i.e., the non-existence of consideration) which had been determined in the opposite by the jury, and on which no finding had been made by the Trial Judge in his opinion granting Respondents' Motion for a Judgment Notwithstanding the Verdict. It is this act which the Petitioneers believe was improper and violative of their Seventh Amendment right to a trial by jury. If the Appellate Court is allowed to take, what is in effect, almost a *de novo* review of the facts, and make factual determinations independent of the Trial Court, it is the position of Petitioners that the rights of parties to a trial by jury have been dangerously violated.

With regard to the specific issue in this case, i.e., the existence of consideration, federal law controls on the issue of whether this is properly a matter for consideration by the judge or consideration by the jury. *Byrd* v. *Blue Ridge Electric Cooperative, Inc.*, 356 US 525, 78 sCt 893, 2 LEd 2d 953 (1958). The question of whether consideration in fact exists for an agreement, when there is evidence relating thereto, is a question of fact. See *American Foreign SS Corp.* v. *9000 Tons of Manganese Ore*, 109 F Supp 765 (DCNJ, 1952). This position is by no means unique to the Federal system, however, for, as was noted in 17A *CJS*, Contracts, Section 613, p.1233,

"Ordinarily, however, the question of the presence of a benefit or detriment to the promisor, sufficient to constitute a consideration is a question of fact, to be determined by the jury where the evidence relating thereto is conflicting, as is the question of what constitutes the consideration, where it is controverted, and its adequacy."

The Sixth Circuit, in this case, did not dispute the fact that oral promises had been made by Mercury to the Chalfontes, to provide them with substantial road travel for promotional appearances and to provide them with substantial nationwide advertising and promotion. Of course, the jury found that both such oral contracts existed, and found further, that Mercury had breached both such promises. However, the Court of Appeals found that there was no consideration to support the oral promises, apparently because it believed that the later oral promises involved promises to do that which the promisor (Chalfontes) was already legally bound to do; i.e., to travel nationally to promotional appearances and participate in Mercury's nationwide advertising and promotional efforts.

As stated, this conclusion ignored facts in the record. The Chalfontes agreed to cooperate with Mercury in its national advertising and promotion plans, as well as road travel plans, by entering into the oral agreements after the recording agreement of February 17, 1965. The recording agreement itself did not contain such promises. In fact, both parties entered into performance on these oral contracts, exhibiting a belief that they considered these oral provisions solemn and binding. Specifically, the Chalfontes cooperated with Mercury's local promotion man in Detroit, in the limited efforts which he made, and also, the Chalfontes, under the auspices of Mercury, actually went on a promotional tour to Chicago — St. Louis — Dayton. Therefore, the Chalfontes actually entered into a course of action based on the oral promises that were made. Furthermore, benefits flowed to Mercury in terms of better product and increased sales, by entering into agreements for road promotion and national advertising with the Chalfontes. Moreover, the Chalfontes gave up other income opportunities, and stood ready, willing and able to engage in road travel or national advertising and publicity efforts to Mercury. Also, Mer-

cury's agent who signed the Chalfontes testified at the trial that the mental attitude of recording artists is extremely important, and that it was one of his functions to keep them in a good frame of mind. Apparently, Mercury's agent Mr. Williams believed that he was accomplishing this end, by entering into the various oral contracts which he did with the Chalfontes. Thus, this complies with the Michigan definition of consideration, which holds that there must be a benefit on one side, and a detriment suffered, or service done, on the other. See *Plastray Corporation* v. *Cole*, 324 Mich 433, 37 NW 2d 162 (1949). (There is no dispute that the substantive law of Michigan applies in this case — See *Ruffin, supra*, p. 1). That the removal of an issue thought properly to be within the ambit of the jury's consideration can constitute a violation of the right to a trial by jury has been recognized by both commentators and the Courts. This issue was touched on in Weiner, *The Civil Jury Trial and the Law – Fact Distinction*, 54 Calif. L. Rev. 1867, 1889, (1966) with regard to the issue of reasonable care in negligence cases. That discussion refers to the ". . . constitutionally supported policy favoring trial by jury." Weiner, *supra*, at 1938.

Other Federal Appellate Courts have taken action in the past, when they thought that the right to a trial by jury had been invaded by an overzealous Judge. Thus, in *Dobson* v. *Masonite Corp.*, 359 F2d 921 (5th Cir, 1966), the United States Court of Appeals for the Fifth Circuit, in an opinion by Judge Hutcheson, reversed the Judgment Notwithstanding the Verdict that had been issued by the Trial Court, in an action concerning a breach of an oral contract. The jury, in *Dobson*, had brought in a verdict for the Plaintiff. In discussing the case, the Court held

> "We conclude that the case as presented to the District Court made necessary a factual determination, that in entering Judgment Notwithstanding the Verdict, the District Court undertook to find the facts itself, and thereby invaded the fact finding province of the jury, and that the entry of Judgment Notwithstanding the Verdict was thus manifestly improper. Accordingly, we reverse the judgment and remand the case with instructions to reinstate the jury's verdict." 359 F2d at 922.

Dobson specifically involved cutting operations by Plaintiff on Defendant's lands. After Plaintiff had performed under the oral contract for some six months, the Defendant unilaterally terminated the contract, and the Plaintiff sued for lost profits. Although the jury, in answering a specific interrogatory given it by the Judge, found that the contract was for services, and rendered judgment for the Plaintiff, the Judge, in *Dobson*, granted the Judgment Notwithstanding the Verdict to Defendant, on the basis that Plaintiff had merely acquired an interest in standing timber, an oral contract which was barred by the Mississippi Statute of Frauds. In reversing the Trial Court, the Fifth Circuit found that interpretation of a contract is always a question of fact. The appellate court, in *Dobson*, held that:

> "As a question of fact, this issue was properly presented to and determined by, the jury, and unless there was no evidence which, if believed would authorize the jury's conclusions, they must stand." 359 F2d at 923.

Similarly, in the case involved here, the issue had been properly presented to the jury as to the existence of consideration for oral promises entered into after the recording agreement of February 17, 1965. The jury was properly instructed on consideration by the Trial Court. The jury found that consideration existed necessary to the formation of valid contracts, found that Mercury had breached those contracts, and issued a verdict in favor of Petitioners in the amount of $125,000. As stated, the issue of oral promises entered into after the recording agreement of February 17, 1965 was entirely overlooked by the Trial Court, when it handed down its Judgment Notwithstanding the Verdict in this case. When the oversight was pointed out to the United States Court of Appeals for the Sixth Circuit, the Trial Court's error was compounded, by an invasion, by the Appellate Court, of the Petitioners' Seventh Amendment right to a trial by jury.

It is the position of Petitioners that this issue is of significant importance to the federal judicial system. If such actions are sanctioned by this Court, an eventual erosion of the jury's function in the judicial system will take place. By examining this

question and ruling thereon, Petitioners believe that this erosion of the province of the jury can be halted. In discussing the federal system of administering justice in *Byrd*, supra, Mr. Justice Brennan stated for the Court:

> "An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between Judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

The influence, if not command, of the Seventh Amendment, here dictates that the Supreme Court, in Petitioners' opinion, hear the important questions involved in this case, involving, as it does, the determination of a Federal question in conflict with applicable decisions of this Court.

B. THE COURT OF APPEALS ALSO SANCTIONED A DEPARTURE BY THE LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, BY FAILING TO RULE THAT THAT COURT HAD VIOLATED PETITIONERS' SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY, IN GRANTING A JUDGMENT NOTWITHSTANDING THE VERDICT TO RESPONDENTS.

The Petitioners argued before the Court of Appeals that their right to a trial by jury had been invaded by the District Court, by the issuance of a Judgment Notwithstanding the Verdict. This position was taken by Petitioners in their initial Brief before the Court of Appeals (See Section V.B.1, p. 17 to 20). Because of the disposition which the Court of Appeals made in this cause, the Court of Appeals did not determine this issue. *Ruffin, supra*, p. 2. Specifically, the Trial Court determined that Mercury's agent had no authority, either expressed or implied to make oral promises to the Chalfontes on behalf of Mercury. The Court, as an independent basis for granting the Judgment N.O.V., had also found that the promises made by Mercury were not sufficiently definite to be enforceable and constituted merely "commercial puffing." In reaching these conclusions, Petitioners submit that the Trial Court ignored a substantial body of record testimony from Mercury's own agent, Mr. Williams, that he did possess the requisite authority to make the oral promises which he did, be that authority expressed, implied, or apparent, under Michigan law. To also

take the position, as the Trial Court did, that no reasonable person could have believed the promises made to the Chalfontes, invades the province of the jury, as the jury, having been instructed on the required standard of definiteness for promises in contracts, found that the promises made by Mercury, regarding road travel and national promotion were sufficiently definite to be enforced, and were reasonable enough to have been believed. Again, to rule as the Trial Court did, that it was not reasonable for the Chalfontes to have believed the promises made by Mercury, contradicted the record, which contained no evidence whatsoever that the Petitioners themselves ever disbelieved the oral promises regarding road travel and national advertising and promotion which were made to them by Mr. Williams. However, the Court adopted Mercury's position, that it could escape its contractual obligations entered into here, because its promises were so ridiculous that no person could believe them, and that it was impossible for the Chalfontes to have believed the words of its agent. Yet, the jury found these very promises to be believable after being properly instructed by the Trial Court on the law. (For the Trial Court's instructions on agency and definiteness, see Appendix D and E, respectively.) The record, once again, supports the jury's findings on this point, and not that of the Court.

The Court of Appeals, in failing to find that the District Court had invaded the jury's province in these respects, sanctioned a departure by the lower Court from the accepted and usual course of judicial proceedings. (The Court of Appeals was moved to comment on the brevity of the Trial Court's opinion, however, stating that it would have been helpful if the district court had stated for the assistance of the reviewing court not only the reasons for its decisions but also supporting authorities therefor *Ruffin, supra*, p. 4) Once again, the role of the jury in the federal system for administering justice is called into question by the actions which have taken place in this case, and, that serious error can only be rectified by the granting of this Petition for Certiorari.

As in *Dobson*, the traditional fact-finding province of the jury has been invaded here, by both the Appellate Court, and the Trial Court. This Jury, after having been instructed on the law in this case by the Trial Court, and having received the Court's own

interrogatories to consider, found for Petitioners, who had exercised their right to a trial by jury. Petitioners believe that the entry of a Judgment Notwithstanding the Verdict, and the affirmance thereof, was as manifestly improper as was the action of the Trial Court in *Dobson*. Substantial issues are here involved concerning the constitutional right to a trial by jury, as it relates, on a continuing basis, to the proper province of judge and jury in the federal system which, Petitioners believe, deserves the immediate attention of this Court.

WHEREFORE, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER and BETTY RODGERS, *Plaintiffs,* v. MERCURY RECORD PRODUCTIONS, INC. and MERCURY RECORD CORPORATION, *Defendants.*	Civil Action No. 36147

MEMORANDUM OPINION AND ORDER

Defendants Mercury Record Productions, Inc., and Mercury Record Corporation have filed motions for judgment notwithstanding the verdict entered in this case and, in the alternative, for a new trial.

These motions are before this court pursuant to Fed.R.Civ.P. 50 and Fed.R.Civ.P. 59 and are based on the record of the trial in this case, which has been properly preserved.

On March 2, 1974, the jury in this case returned a verdict in favor of the plaintiffs and against the defendants, and assessed damages in the amount of $125,000.00.

The verdict included interrogatories propounded by the court. Based on these answered interrogatories, the jury found that the defendants had not breached their duties under the written contract to reasonably promote the plaintiff's group and to have a corporate organization reasonably capable of fulfilling the obligations stated in the recording agreement between the parties. These were the only issues submitted to the jury under the written contract. The jury found, however, that the defendants had breached their duties, under an alleged oral contract made contemporaneously with the signing of the written contract, to provide substantial road travel for promotional appearances and to provide substantial nationwide advertising and promotion.

Based on the record in this case and the briefs and arguments submitted by counsel this court finds, with respect to defendants' motion for judgment notwithstanding the verdict, that there was no legally sufficient evidence for the jury to find that the alleged oral statements relating to substantial road travel and substantial advertising and promotion imposed a contractual obligation on the defendants.

There was no competent and sufficient evidence to establish that Andre Williams, a former employee of the defendants, had express or implied authority to bind the defendants to the alleged oral promises. Moreover, even if the alleged oral promises were made they constituted nothing more than commercial "puffing" and did not attain the degree of certainty necessary to form an enforceable oral contract.

All statements made contemporaneous with or prior to the written contract were merged in the written contract and not binding on the defendants.

All of these matters were raised as a part of defendants' motion for directed verdict at close of all the proofs. At that time the court was in serious doubt of the sufficiency of the proofs on these matters and since the matter was to be submitted to the jury on the issue of the breach of the written agreement, it was also submitted on the oral statements. Based on the Answer to Interrogatories 1 and 2 relating to the written contract, and the absence of the facts in the record and the state of the law as to the alleged oral statements, defendants' motion for judgment notwithstanding the verdict is, therefore, granted.

Defendants' motion for new trial is denied on all grounds contended by the defendants, other than the grounds on which the motion for judgment notwithstanding the verdict was sustained.

So ordered.

CHARLES W. JOINER
United States District Judge

Dated: April 11, 1974
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER and BETTY RODGERS, *Plaintiffs,* v. **MERCURY RECORD PRODUCTIONS, INC. and MERCURY RECORD CORPORATION,** *Defendants.*	**Civil Action No. 36147**

JUDGMENT

The defendants' motion for judgment notwithstanding the verdict and, alternatively, for a new trial came on for hearing before the court, Honorable Charles W. Joiner, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered by a Memorandum Opinion and Order, dated April 11, 1974,

IT IS ORDERED AND ADJUDGED that based upon the jury's answers to Interrogatories One (1) and Two (2), attached to the verdict, and this court's Memorandum Opinion and Order dated April 11, 1974, that the plaintiffs take nothing and that the action be dismissed with prejudice.

Dated At Detroit, Michigan, this 12th day of April, 1974.

/s/ HENRY R. HANSSEN
Henry R. Hanssen
Clerk of the Court

Approved as to form:

_____

by _____
Deputy Clerk

No. 74-2127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER and BETTY RODGERS *Plaintiffs-Appellants* MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION, *Defendants-Appellees.*	On Appeal from the United States District Court for the Eastern District of Michigan.

Dated and Filed March 31, 1975.

Before: PHILLIPS, Chief Judge, PECK and McCREE, Circuit Judges.

PER CURIAM. This is an appeal from an order granting defendants' motion for judgment n.o.v. in an action for breach of contract, both oral and written, brought by four young women, former members of a vocal group, the "Chalfontes," against Mercury Productions, Inc. and Mercury Record Corporation (Mercury). The district court had diversity jurisdiction and the substantive law of Michigan applies.

The case was tried before a jury which, in response to special interrogatories, determined that Mercury had not breached the written recording contract but that it had breached certain oral promises allegedly made to appellants to provide them with national advertising and with singing tours in addition to its undertakings in the written agreement. A verdict of $125,000 was awarded.

After trial Mercury moved for judgment n.o.v. The district court, in granting the motion, determined without specific reference to Michigan law, that the oral promises made by Mercury's

agent were unenforceable for several reasons: (1) because the agent had no authority, either express or implied, to make them on behalf of Mercury; (2) because the promises were indefinite and constituted "commercial puffing"; and (3) because they violated the parol evidence rule.

Appellants assign as error each of these determinations. They also argue that even if oral promises made before the signing of the contract are unenforceable under the parol evidence rule, Mercury's agent made similar oral promises after the contract had been signed and that these are enforceable.

We conclude that the district court was correct in holding that the parol evidence rule barred the introduction into evidence of the oral promises made before the contract was signed and precludes their enforcement. We also hold that any promises made after the contract had been signed were not supported by consideration and are, accordingly, unenforceable. Because of these determinations, we need not decide whether the agent was authorized or whether his statements were mere puffing.

In Michigan the parol evidence rule renders oral agreements unenforceable and precludes their admission into evidence when they add to or change a subsequent written contract that is integrated. *Brady* v. *Central Excavators, Inc.*, 316 Mich. 594, 25 N.W.2d 630 (1947). In that case, the Michigan Supreme Court quoted with approval the following statement:

> "The test of the completeness of the writing proposed as a contract is the writing itself. If this bears evidence of careful preparation, of a deliberate regard for the many questions which would naturally arise out of the subject-matter of the contract, and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically

examined in the light of its surrounding circumstances, with a view of determining whether it is a memorial of the transaction."

Id. at 606. There is no doubt in this case that the written agreement which set out carefully and in great detail the rights and obligations of the parties was, as a matter of law, an integrated contract. Accordingly, "all prior negotiations pertaining to that subject matter . . . [were] merged in the written contract and parol evidence is inadmissible to show that the contract does not conform with the verbal agreements made prior to its execution." *Id.* at 607.

Any oral promises made after the contract had been signed were unenforceable because they were not supported by consideration. *E.g.*, *Green* v. *Millman Brothers, Inc.*, 7 Mich. App. 450, 151 N.W.2d 860 (1967). In that case the court, in explaining the law of Michigan, stated that "[t]he general rule is that a promise to do that which the promisor is legally bound to do, or the performance of an existing legal obligation, does not constitute consideration, or sufficient consideration, for a contract." *Id.* at 455. Appellants have not asserted any reason why this rule should not render unenforceable the oral promises made after the execution of the contract.

In their brief, appellants have charged that the trial court was prejudiced against their claim and, as evidence of its alleged bias, they point to the district court's failure to cite any authorities to support the conclusions in its order granting the motion for judgment n.o.v. It would have been helpful if the district court had stated for the assistance of the reviewing court not only the reasons for its decision but also supporting authorities therefor. We are, from our experience, sympathetically aware of the docket problems of trial courts, but we observe that the statement of reasons and authority is not only an appropriate self-discipline but also serves as a safeguard against charges of bias and arbitrariness. We have examined the entire record on appeal and find no basis for the claim of bias against appellants.

Affirmed.

NO. 74-2127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER, and BETTY RODGERS, *Plaintiffs-Appellants* v. **MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION,** *Defendants-Appellees.*	ORDER

BEFORE: PHILLIPS, Chief Judge, PECK and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

Entered by order of the court

/s/ JOHN P. HEHMAN
Clerk

JURY CHARGE ON AGENCY

Jury Charge, Pages 17, 18

Defendants Mercury Record Productions, Inc., and Mercury Record Corporation contend that any promises made to the plaintiffs by any of defendants' agents were made outside of the agents' scope of employment.

In order for a principal, or employer, to be liable for the alleged wrongful acts of their agents the acts of the agents must be done in the scope or course of the agents' employment, that is, under the express or implied authority of the principal.

An agent is acting within the scope of his employment when he is engaged in doing for his principal, or employer, what he has been directed to do.

Acts impliedly authorized, or such as are within the "scope of employment", that is, wrongs for which the principal or employer may be held accountable, are not susceptible to precise definition. As to persons who do not have knowledge of limitations placed on an agent's authority, the principal is bound by the agent's apparent authority. The authority from the principal, or employer, is to be gathered from and determined by the surrounding facts and circumstances - the character of the employment and the nature of the wrongful act - and is to be determined by you as jurors.

I want to make one thing clear to you. I am not submitting for your decision as a basis for recovery any matters concerning alleged promises or representations relating to the Chalfontes and the Supremes.

Nor am I submitting to you for your decision as a basis of recovery any question concerning alleged sexual advances made to the plaintiffs by persons connected with defendants Mercury Record Productions, Inc.,

JURY CHARGE ON DEFINITENESS

Jury Charge Page 9

The offer *must be definite and certain*. An offer is judged by its objective manifestations, not by any mental reservations or subjective interpretations or intentions of the party making the offer. An intention to do an act is not an offer to do it. A mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. It is necessary that the offer be communicated or published. The fact that it has been communicated or published, however, may sometimes be inferred from the surrounding circumstances or from the fact that the party to whom the offer is directed knows of the offer.

No. 75-331

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SEP 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER, and BETTY RODGERS,

Petitioners,

vs.

MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-331

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER, and BETTY RODGERS,

Petitioners,

vs.

MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION,

Respondents.

BRIEF OF RESPONDENTS MERCURY RECORD PRODUCTIONS, INC. AND MERCURY RECORD CORPORATION IN OPPOSITION TO CERTIORARI

Respondents Mercury Record Productions, Inc. and Mercury Record Corporation respectfully submit that the Petition for Writ of Certiorari filed by Geneva Ruffin, Delores Gates, Elaine Porter, and Betty Rodgers is without merit and should be denied.

Questions Presented

Contrary to the statement of the "Questions Presented" framed by the petition (p. 2), the only question presented is:

Whether, under the authority of Rule 50(b) of the Federal Rules of Civil Procedure, the determination by both the trial court and the Court of Appeals for the Sixth Circuit that the evidence was insufficient, as a matter of law, to submit the case for the jury's determination, was violative of petitioners' rights under the Seventh Amendment?

Petitioners present neither a novel nor important question of Constitutional dimension.

Statement of the Case

Petitioners' statement of the case is misleading and incomplete in one important respect. They claim that no specific finding was made by the trial judge indicating a lack of consideration to support the post-contract promises. However, aside from the three specific reasons given by the trial court for the entry of judgment notwithstanding the verdict, the trial court also stated as follows:

> ". . . there was no legally sufficient evidence for the jury to find that the alleged oral statements relating to substantial road travel and substantial advertising and promotion imposed a contractual obligation on the defendants."

Although petitioners claim in their brief that the record discloses "substantial evidence" that post-contract promises were supported by consideration, no such evidence exists. Petitioners have not referred to any portion of the record to support this wholly gratuitous statement.

Reasons For Denying The Writ

I.

THE ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT CONSTITUTE A DEPRIVATION OF ANY RIGHTS UNDER THE SEVENTH AMENDMENT.

Petitioners have attempted to obscure firmly rooted and very basic modes of trial procedure under the guise of "constitutional principles" by asserting that the granting of judgment notwithstanding the verdict in the instant case was a deprivation of rights under the Seventh Amendment.

No longer can there be any doubt, however, that Rule 50(b) of the Federal Rules of Civil Procedure is entirely consistent with and not an infringement of Seventh Amendment guarantees. The constitutionality of the Rule is thoroughly settled. In *Neely* v. *Martin K. Eby Construction Co.*, 87 S. Ct. 1072, 386 U.S. 317, 18 L.Ed. 75 (1967) reh. denied 87 S. Ct. 1366, 386 U.S. 1027, 18 L.Ed. 2d 471, this Court recently stated with respect to the entry of judgment notwithstanding the verdict (386 U.S., p. 321):

> "This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S.Ct. 890; 79 L.Ed. 1636, with Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, and Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177. *And it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial.* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147." (Emphasis added)

Petitioners have placed heavy reliance on the bitterly criticized case of *Slocum* v. *New York Life Ins. Co.*, 228

U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1912). The *Slocum* case, however, has been completely eroded, if not *sub silentio* overruled by more recent holdings of this Court.

In *Montgomery Ward & Co.* v. *Duncan*, 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147 (1940), this Court stated (311 U.S., p. 250):

> "The Rule [50b] was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution."

In *Berry* v. *U.S.*, 312 U.S. 450, 61 S. Ct. 637 (1941), this Court stated with reference to Rule 50(b) (312 U.S., p. 452):

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

Finally, in *Galloway* v. *U.S.*, 63 S. Ct. 1077, 319 U.S. 372, 87 L.Ed. 2d 1458, rehearing denied 63 S. Ct. 1443, 320 U.S. 214, 87 L.Ed. 1851 (1943), it was stated with respect to the power of a trial judge to remove a case from the jury (389 U.S., p. 1086):

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by re-

peated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450, 61 S. Ct. 637, 85 L.Ed. 945. The objection therefore comes too late."

See also *Lyon* v. *Mutual Benefit Association*, 59 S. Ct. 297, 305 U.S. 484, 83 L.Ed. 303, rehearing denied 59 S. Ct. 459, 306 U.S. 667, 83 L.Ed. 1062 (1939); *Coughran* v. *Bigelow*, 17 S.Ct. 117, 164 U.S. 308, 41 L.Ed. 442 (1896); *Cox* v. *City of Freeman, Missouri*, 321 F.2d 887 (C.A. Mo. 1963); Wright & Miller, *Federal Practice & Procedure*, sec. 2522, p. 538; 5A *Moore's Federal Practice*, sec. 50.07(1), p. 2351.

It is well established that the direction of a verdict (or entry of a judgment notwithstanding the verdict) is not an infringement of the right to a jury trial where the question is one of law. *Whitsell* v. *Alexander*, 229 F. 2d 47 (C.A. Ill. 1956) cert. denied 76 S.Ct. 788, 351 U.S. 932, 100 L.Ed. 1461. "Trial by jury" means a trial by twelve men under supervision of the judge empowered to instruct and advise them and to set aside the verdict, if against the law or evidence. *Howard* v. *L.A. & A. Railway Co.*, 49 F.2d 571 (C.A. Louisiana 1931). As noted by this Court in *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935), (295 U.S., p 657):

> "The aim of the amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

In the instant case, the question of whether sufficient evidence existed to establish consideration for the alleged post-contract promises was a *question of law* for the trial court and part of its historic function of determining questions of law. The right to a jury trial is protected by providing a uniform rule to be used in the exercise of the power of the trial judge to remove cases from the court's decision. *Helene Curtis Industries, Inc.* v. *Pruitt,* 385 F.2d 841 (C.A. Tex. 1967), cert. denied 88 S.Ct. 1806, 391 U.S. 913, 20 L.Ed. 652.

Petitioners have not pointed to any portion of the record to support their contention that consideration was in fact present and allege that the trial court did not make any finding in this regard. The trial court did say, however:

> "... there was no legally sufficient evidence for the jury to find that the alleged oral statements relating to substantial road travel and substantial advertising and promotion imposed a contractual obligation on the defendants."

Petitioners also question the finding of the Court of Appeals for the Sixth Ciricuit that consideration did not exist and assert that the court had no power to make such a determination in the absence of a finding by the trial judge. Even assuming *arguendo* that the issue of lack of consideration was not determined by the trial court, petitioners' argument ignores the well recognized principle that an appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court. *Helvering* v. *Gowran,* 58 S.Ct. 154, 158, 302 U.S. 239, 245, 82 L.Ed. 2d 224 (1937).

In summary, the constitutional right to a jury trial was not impaired either by the trial court or the Court of Appeals for the Sixth Circuit.

II.

JURISDICTION OF THIS COURT TO REVIEW BY CERTIORARI DOES NOT EXTEND TO CASES INVOLVING THE PROPRIETY OF NOT SUBMITTING ISSUES FOR THE JURY'S CONSIDERATION.

This Court has often stated that jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance to the public. *Ex Parte Lau Ow Ben,* 12 S.Ct. 45, 141 U.S. 583, 35 L.Ed. 868 (1891). It is not granted to determine questions of the sufficiency or insufficiency of evidence presented to the trial court since this depends essentially upon consideration of the evidence. *Houston Oil Co.* v. *Goodrich,* 38 S. Ct. 140, 245 U.S. 440, 62 L.Ed. 385 (1918).

In *Dick* v. *New York Life Insurance Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed. 2d 935, Justice Frankfurter stated (p. 455):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. Chief Judge Magruder has expressed the common sense of the matter:
>
> > "If an appellate court is of the view that the trial judge made an error of judgment in with-

> drawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal [by a Court of Appeals] is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment'."

Finally, in *Manaia* v. *Potomac Electric Power Co.*, (C.A. Md. 1959) 268 F.2d 793, cert. denied 80 S.Ct. 255, 361 U.S. 913, 4 L.Ed. 2d 183, where the argument was also made that the entry of judgment n.o.v. is violative of Seventh Amendment rights, it is stated (p. 798-799):

> ". . . no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. * * * [I]ts employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury."
>
> * * *
>
> "The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principles into the familiar process of appraisal of evidence and its associated inferences.
>
> "Where a court indifferent to the established basis upon which powers have been allocated between the court and jury are beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. . . . The attempt . . . to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this."

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for Writ of Certiorari filed by Geneva Ruffin, Delores Gates, Elaine Porter, and Betty Rodgers should be denied.

Respectfully submitted,

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